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No. 90-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NURSE MIDWIFERY ASSOCIATES,
SUSAN SIZEMORE, VICTORIA HENDERSON
DARRELL MARTIN, M.D.,
RICHARD CARPENTER and MARGARET CARPENTER,
Petitioners,

v.

HENDERSONVILLE COMMUNITY HOSPITAL
and
SOUTHERN HILLS HOSPITAL,
Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
STATEMENT OF CASE	1
Introduction	1
Facts Established for Purposes of Summary Judgment	1
A. Hendersonville Community Hospital and Dr. Shackleford	2
B. Southern Hills Hospital and Drs. Melkin, Andrews and Baer	3
C. Vanderbilt University, Dr. B.K. Hibbett and State Volunteer Mutual Insurance Company	5
Procedural Course	5
REASONS WHY THE PETITION SHOULD BE DENIED	7
I. JUDICIAL ECONOMY WOULD BEST BE SERVED BY DENYING THE WRIT	7
II. THE ISSUES WHICH PETITIONERS SEEK TO RAISE NEED NOT BE ADDRESSED UNDER THE FACTS OF THIS CASE	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

Cases

Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. 799 (M.D. Tenn. 1988) 1,5,10

Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605 (6th Cir. 1990) 1,6

Statutes

15 U.S.C. § 1 [Sherman Antitrust Act § 1] 1,6,8,9

28 U.S.C. § 1292(b) 6

Rules

Federal Rules of Civil Procedure 54(b) 6

STATEMENT OF CASE

Introduction

This antitrust action was filed in the United States District Court for the Middle District of Tennessee by two nurse midwives (petitioners Sizemore and Henderson), the obstetrician (petitioner Dr. Martin) with whom they had affiliated, and three of their clients, against three Nashville hospitals (respondents Hendersonville Community Hospital and Southern Hills Hospital, as well as Vanderbilt University Hospital), certain members of the medical staffs of two of respondents, another practicing obstetrician in Nashville, and a physician-controlled insurance company (State Volunteer Mutual Insurance Company). Plaintiffs[1] alleged that these defendants had engaged in several conspiracies to restrain trade, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

Motions for summary judgment dismissing all defendants except respondents Hendersonville Community Hospital and Southern Hills Hospital were granted by the District Court. *Nurse Midwives Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1982). Appeals were taken to the United States Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part, and remanded the case for trial of plaintiffs' claims against some defendants, including claims against respondents Hendersonville Community Hospital and Southern Hills Hospital. *Nurse Midwifery Associates, et al. v. Hibbett, et al.*, 918 F.2d 605 (6th Cir. 1990).

Facts Established for Purposes of Summary Judgment

The following are the facts which the United States Magistrate, the District Court and the Court of Appeals assumed for purposes of the motions for summary judgment filed by defendants; such assumed facts certainly

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[1] For purposes of the Statement of the Case, the parties will be referred to in the capacity which they hold or held in the District Court, either as plaintiff or defendant.

represent the most favorable possible view of the evidence in plaintiffs' favor.

Plaintiffs Sizemore and Henderson are certified nurse midwives who formed plaintiff Nurse Midwifery Associates ("NMA") in order to provide nurse midwifery service in the private sector of the Nashville, Tennessee, area. NMA entered into an agreement with plaintiff Dr. Darrell Martin, a practicing obstetrician, under which NMA would operate as an independent practice, and Dr. Martin and his associates would provide medical supervision and services.

A. Hendersonville Community Hospital and Dr. Shackleford.

Defendant Hendersonville Community Hospital ("HCH") is a privately owned community hospital located in Hendersonville, Tennessee, a small town in the Nashville area. Dr. Martin and his associates were members of the active medical staff of HCH. On February 18, 1980, after initial positive discussions with the administrator of HCH, plaintiffs Henderson and Sizemore submitted their applications for appointment to the medical staff, and for clinical privileges to practice nurse midwifery in collaboration with physicians.

The next day, the hospital's administrator advised Henderson and Sizemore that their applications had been approved by the HCH Obstetrics Department, pending approval of their protocol.[2] On March 8, 1980, the Obstetrics Department approved the protocol.

In late March, the Pediatrics Department, including defendant Dr. Conrad Shackleford, met and discussed the nurse midwifery proposal. The department unanimously recommended that the proposal be rejected, raising six concerns. During April and May, the Obstetrics and Pediatrics Departments held several meetings and, although

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[2] The protocol is the document setting out the details of the supervisory relationship between nurse midwives and the supervising obstetrician.

it appeared that the concerns of the pediatricians had been satisfactorily answered, they refused to approve the protocol.

At a meeting of the Medical-Executive Committee on April 23, 1980, Dr. Shackleford, a member of the Committee, said that a number of pediatricians would leave the staff of HCH if they were required to treat newborns delivered by nurse midwives.

At a subsequent meeting, the members of the Pediatrics Department confirmed that they would not treat newborns delivered by nurse midwives under the on-call schedule normally used for newborns delivered by obstetricians. They agreed that a pediatrician with active privileges at HCH should be recruited by nurse midwives to serve as back-up. Dr. Shackleford joined in these agreements.

On May 20, 1980, the Executive Committee, including Dr. Shackleford, voted to accept the final action of the Pediatrics Department. As a result of these actions, Henderson and Sizemore were unable to initiate their practice at HCH.

B. Southern Hills Hospital and Drs. Melkin, Andrews and Baer.

Defendant Southern Hills Hospital ("SHH") is a small, privately owned community hospital in Nashville to which Sizemore and Henderson also applied for appointment to the medical staff, before final action had been taken by HCH. Sizemore and Dr. Martin met initially with the administrator of SHH who told them that SHH by-laws would permit the granting of privileges to nurse midwives. The administrator was encouraging regarding their proposal, but stated that he did what the doctors at SHH wanted him to do.

On June 18, 1980, the Executive Committee of SHH began its initial review of the applications and appointed an ad hoc committee to investigate the proposal. The committee was composed of defendant Dr. George Andrews,

Chairman of SHH's Obstetrics Department, three other doctors, and an attorney.

In July 1980, Dr. Martin met with defendant Dr. Stephen Melkin, a specialist in OB/GYN at SHH and a member of the Executive Committee. Dr. Melkin displayed an extremely negative reaction toward NMA, stating, "If nurse midwives started delivering babies, the next thing they would want to do is heart surgery." In that same month, defendant Dr. Harry Baer, an obstetrician who was a member of the SHH medical staff, told an obstetrician at Baptist Hospital that plaintiffs would get privileges at Baptist "over his dead body." Dr. Baer practiced medicine in partnership with Dr. Melkin; both practice at Baptist Hospital as well as SHH. Also, Dr. Baer expressed concern that other obstetricians just starting out were not yet "up to capacity."

On August 7, 1980, plaintiffs were given an opportunity to discuss their protocol with the ad hoc committee. The committee, most notably defendant Dr. George Andrews, appeared not to be interested in the manner in which nurse midwives practiced or the specific practice arrangement between the plaintiffs, but seemed overly concerned with the financial relationship between nurse midwives and Dr. Martin.

At the SHH Executive Committee meeting on September 25, 1980, the ad hoc committee's report was adopted, recommending that the nurse midwives' applications be denied in their present form. The report also recommended that privileges be granted if additional conditions were met. The principal conditions were that an obstetrician be present for all deliveries, that two obstetricians with privileges at SHH agree to sponsor, supervise, and assume responsibility for the nurse midwives' actions, and that the sponsoring physicians furnish adequate liability insurance indemnifying SHH for the activities of nurse midwives. The report concluded that these conditions were "necessary to assure quality patient care and reduce any risk of injury to a patient with possible ensuing liability to the Hospital."

On October 16, 1980, the SHH Board of Trustees adopted the recommendation of the Executive Committee and denied the nurse midwives' application for privileges. When the administrator informed the petitioners that their applications had been denied, they asked for a copy of the ad hoc committee's report, but were refused. Dr. Andrews told them that if they were to reapply, the Obstetrics Department would adopt new policies regarding mandatory enemas, perineal shaving, electronic fetal monitoring, intravenous fluids and ambulation, and would close the birthing room.

C. Vanderbilt University, Dr. B.K. Hibbett and State Volunteer Mutual Insurance Company.

SVMIC, Vanderbilt and Dr. Hibbett were not allegedly involved in the conspiracies at HCH and SHH, and no further discussion of facts relating to those defendants is required.

Procedural Course

On March 2, 1981, plaintiffs filed their Complaint raising claims under the Sherman Antitrust Act and various pendent state law claims. The Complaint alleged that competition was restrained due to conspiracies (1) among HCH, Dr. Shackleford, and the other members of the HCH pediatric staff; (2) among SHH and Drs. Melkin, Andrews and Baer; (3) between Vanderbilt and the members of its medical staff; (4) between Vanderbilt and Dr. Hibbett; (5) between HCH and SHH[3]; and (6) between SVMIC and Dr. Hibbett.

Defendants all moved for summary judgment. The District Court held that, under the intracorporate conspiracy doctrine, there could be no conspiracy between the hospitals and their respective medical staffs. *Nurse Midwifery Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1988).

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[3] Or so the Court of Appeals stated in its opinion. In fact, however, no such conspiracy was alleged in any pleading, and no such conspiracy was ever suggested until after the motions for summary judgment were filed.

The District Court granted summary judgment on all of plaintiffs' claims, except their claim of a conspiracy between SHH and HCH. Pursuant to Fed. R. Civ. P. 54(b), the District Court entered a final judgment on all of plaintiffs' claims, except for the claim of conspiracy between SHH and HCH. Plaintiffs appealed all of these judgments but plaintiffs thereafter reached a settlement dismissing their claims against Vanderbilt. In addition, the District Court granted defendants SHH and HCH an interlocutory appeal (which the Court of Appeals accepted) pursuant to 28 U.S.C. § 1292(b) on its decision denying summary judgment on plaintiffs' claims of a conspiracy between these two defendants.

The Court of Appeals, *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), held that the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff. It held that Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm. It reasoned that when determining whether the intracorporate conspiracy doctrine applies to an alleged conspiracy between a hospital and its medical staff, there are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff are not competitors. With respect to the allegations that HCH and SHH conspired with their respective medical staffs, the Court of Appeals concluded that the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.

In addition, with respect to the allegation that Dr. Shackleford conspired with the other pediatricians on the HCH medical staff, the Court of Appeals found that although Dr. Shackleford is a competitor *of the other pediatricians* on the HCH medical staff, NMA's application for privileges at HCH do not relate to the market in which they compete

as individuals *since NMA competes with obstetricians, not pediatricians.*

The Court of Appeals held that with respect to the allegation that Drs. Melkin, Andrews and Baer conspired with each other and other members of the SHH medical staff, the District Court *erred* in concluding that Drs. Melkin, Andrews and Baer were agents of SHH. These doctors, the Court of Appeals held, are competing obstetricians alleged to have joined together to cause SHH to deny privileges to a competitor and, to that extent, are not agents of SHH for purposes of applying the intracorporate conspiracy doctrine.

The Court of Appeals rejected plaintiffs' arguments that an agent acting with anticompetitive motives due to some independent personal stake warrants abandoning the traditional rule that a principal cannot conspire with one of its agents, and declined to adopt this suggested exception.

In summary, the Court of Appeals reversed the District Court's decision granting summary judgment in favor of SVMIC and of Drs. Melkin, Andrews and Baer, and affirmed the decision in all other respects, including its refusal to grant summary judgment on the claim that respondents SHH and HCH conspired with each other. The case was remanded for further proceedings consistent with that opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition for a Writ of Certiorari should be denied for the following reasons.

I. JUDICIAL ECONOMY WOULD BEST BE SERVED BY DENYING THE WRIT.

Petitioners were largely successful in the Court of Appeals, which remanded the case for trial not only against respondents HCH and SHH, but also against Drs. Melkin, Andrews and Baer, and against SVMIC. Regardless of whether this Court grants the writ and affirms or reverses the Court of Appeals, plaintiffs will have their day in Court

against respondents. Curiously, plaintiffs have not sought review by this Court of the dismissal of Dr. Shackleford, who was HCH's alleged co-conspirator. This litigation, which has already been unfortunately protracted, would only be further delayed if this Court were to grant certiorari to address a single narrow aspect of the Court of Appeals' opinion. It is possible that plaintiffs will be successful at trial on their claims that HCH and SHH conspired with one another. Additional appellate review will, in any event, be available following the trial, and this Court may at that time choose whether to address the issues raised in the pending Petition on a complete record, rather than on the abbreviated record presented on a motion for summary judgment.

II. THE ISSUES WHICH PETITIONERS SEEK TO RAISE NEED NOT BE ADDRESSED UNDER THE FACTS OF THIS CASE.

Petitioners ask this Court to consider whether, as a matter of law, a hospital cannot be found to have conspired with members of its medical staff in violation of Section 1 of the Sherman Act by denying staff privileges to practitioners in potential competition with those staff members. However, the Court of Appeals did not hold that a hospital can *never* be found to have conspired with members of its medical staff when it denies such privileges. The Court of Appeals held only as follows:

> *When the staff as a group makes decisions or recommendations for the hospital* in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.

* * *

> With respect to the allegations that HCH and SHH conspired with their respective medical staffs, for the reasons stated above, we conclude that *the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.*

(Emphasis supplied.) In this case the only conspiracies alleged between the hospitals and members of their respective medical staffs were conspiracies between the hospitals and those members of the medical staffs charged with making decisions or recommendations for the hospitals. At the conclusion of discovery, plaintiffs continued to maintain that they could not "identify the . . . other co-conspirators." (Paragraphs 21(b) and 24(a) of Responses to the First Set of Interrogatories of Defendants Hendersonville Community Hospital, Southern Hills Hospital and Vanderbilt University Hospital by Plaintiffs Sizemore, Henderson, Nurse Midwifery Associates and Martin.) The Court of Appeals was thus not required to decide whether physicians who are *not* charged with responsibility for making peer review recommendations or decisions can enter into an actionable Section 1 conspiracy with a hospital concerning such decisions. To the extent that the physician defendants were acting as agents for HCH and SHH, they could not have conspired with the hospital under the intracorporate conspiracy doctrine. To the extent that they were conspiring with other members of the medical staff to restrain competition from their competitors (which the Court of Appeals expressly found was *not* the case at HCH), the Court of Appeals held that they were not agents of the hospital, and it follows that they could not have conspired with anyone else on the hospital's behalf.

The other issue sought to be raised by petitioners (but not addressed at any length in the body of the Petition) is whether a hospital can be vicariously liable under Section 1 of the Sherman Act for a decision by its medical staff denying staff privileges to practitioners in potential

competition with those staff members. The Court of Appeals was not required to reach that issue. While it found that Dr Shackleford, a pediatrician, was acting as agent for HCH, and that Dr. Shackleford was a competitor of the other pediatricians on HCH's staff, it held that plaintiffs compete with obstetricians, not pediatricians. With respect to SHH, the Court held that Drs. Melkin, Baer, and Andrews were not agents of SHH for purposes of the allegation that they conspired with each other to deny privileges to a competitor. Petitioners do not suggest any basis for holding SHH vicariously liable for actions by persons who were not its agents.

Although not mentioned in the Questions Presented portion of the Petition, petitioners argue that this Court should consider whether there is an independent personal stake exception to the intracorporate conspiracy doctrine. Again, the facts presented do not require consideration of this issue. The District Court had already concluded that, even if such an exception were available, petitioners' claims would still fail. As to the alleged conspiracy between HCH and a member of its medical staff, the District Court found that

> [a]lthough [the medical staff member's] private practice may have given him an independent personal stake in achieving the object of the alleged conspiracy, the facts do not show that he possessed or exercised the power to institute an anti-competitive policy for HCH, a requisite element under the exception where applied.

Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. at 805. Likewise, the District Court also held that such a claim would fail against SHH because "the individual defendants did not possess the power to effect an anti-competitive policy at SHH." *Id.*

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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